IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2453 OF 2006

Krishna S. Niphadkar ....Petitioner
V/s.
Vatsalabai S. Niphadkar & Ors. ....Respondents

Mr.G.S. Godbole for the Petitioner.
Mr.S.S. Kulkarni for Respondent Nos.1 and 2.

CORAM : R.M. SAVANT, J.
DATED : 5TH JUNE, 2007.

P.C. :

1. Rule. Rule with the consent of the parties made returnable forthwith and heard.

2. This Petition filed under Article 227 of the Constitution of India impugns the judgment and order dated 23.12.2005 passed by the learned Civil Judge (J.D.), Nashik on Exhibit 27 in Civil Misc. Application (C.M.S.) No.139 of 1999, as also the order dated 11.11.2005 passed on Exhibit 1 in C.M.S. No.139 of 1999 filed by the Petitioner. The consequence of the said is that the Petitioner's application for restoration of Spl.C.S. No.337 of 1990 has been rejected.

3. Such of the facts which are necessary to be cited are stated thus :-

. The Petitioner is the original Plaintiff in Spl.C.S. No.337 of 1990 filed in the court of the learned Civil Judge (J.D.), Nashik against the Respondents herein who are the Defendants. The said suit has been filed for partition and separate possession of 4/9th undivided share of the Petitioner in the suit properties which are described in the plaint.

4. In the said suit the Defendants on various dates filed their written statement. In so far as Defendant No.6 is concerned, who is Respondent No.6 to the present Petition, he has filed a pursis and contended that he was unnecessarily impleaded as a party Defendant in the said suit. "No written statement" order was passed against Defendant No.4 to the said suit. She did not contest the same and therefore the said suit proceeded without her written statement.

5. On 2.7.1999, an application was made on behalf of the Petitioner for adjournment in the said suit. Since the Petitioner could not remain present

in the Court, the said application for adjournment was rejected. Since the Petitioner could not remain present in the Court and also since the costs awarded on the last date were not paid and also on the ground that the reason for absence was not satisfactory. The said Spl.C.S. No.337 of 1990 came to be dismissed on the said day. The Petitioner immediately thereafter on 13.7.1999, filed C.M.A. No.139 of 1999 for restoration of the said suit. The summons in respect of the said application came to be issued and the learned Civil Judge (S.D.), Nashik was pleased to pass an order directed the said C.M.A. No.139 of 1999 should be proceeded ex-parte against Respondent Nos.3 to 5. It is the case of the Petitioner that in spite of his best efforts, he could not find the correct address of Respondent No.6, who was Defendant No.6 in the said suit, therefore summons in respect of the said C.M.A. No.139 of 1999 could not be served upon the said Respondent No.6. The Petitioner therefore sought time vide an application which is numbered as Exhibit 25 to take steps against Respondent No.6. Since the steps had to be taken against Respondent No.6 as the summons were received back as unserved, the matter was adjourned to 1.8.2005. Thereafter the matter was adjourned from time to time and lastly to 22.12.2005. It is the case of the Petitioner that

though the matter was adjourned to 22.12.2005 as was the impression gathered by the Petitioner from the copy of the daily board. The learned Civil Judge (J.D), Nashik passed an order dismissing the said C.M.A. No.139 of 1999 on 11.11.2005, as no steps were taken by the Petitioner for service of notice on Respondent No.6. Having come to know about the dismissal of C.M.A. No.139 of 1999 on 11.11.2005, the Petitioner filed an application Exhibit 27 on 23.12.2005 for setting aside the dismissal order dated 11.11.2005 passed in the said C.M.A. No.139 of 1999. The Petitioner also filed affidavit Exhibit 28 in the said application. The learned Civil Judge (J.D.), Nashik by the impugned order has dismissed the said application below Exhibit 27.

6. It is the said order dated 11-11-2005 and the order dated 23-12-2005 which have been impugned in the present petition.

7. I heard the learned counsel for the respective parties. Mr.Godbole, the learned Counsel appearing on behalf of the Petitioner states that the application filed by the Petitioner for setting aside the dismissal order was within the ambit of Order 9 Rule 5 of the Civil Procedure Code, 1908 and,

therefore, the learned Judge erred in dismissing the said application. Mr.Godbole contended that dismissal of the said suit on 2-7-1999 was harsh as the Petitioner could always have been put to terms for restoration of the said suit. Mr.Godbole further submits that dismissal of CMA 139 of 1999 on 11-11-2005 was also on account of misunderstanding on the part of the petitioners advocate. The petitioners advocate in view of the noting on the daily board was under the impression that CMA 139 of 1999 was adjourned to 22-11-2005, when in fact it was already dismissed on 11-11-2005, since they were labouring under the said impression that the steps in respect of Respondent No.6 had not been taken. In any event, Mr.Godbole submits that the address of respondent No.6 i.e. Defendant No.6 to the suit is now available with the petitioner and, therefore, the petitioner may be given one last opportunity to get the said suit restored.

8. On the other hand, it is contended by Mr.Kulkarni, the learned counsel appearing on behalf of the contesting respondent Nos.1 and 2 that the Petitioner has been negligent and callous in prosecuting the suit, the petitioner has not complied with the orders passed by the Trial Court from time to

time. The petitioner did not remain present as also did not pay the costs awarded as a consequence of which the Trial Court was constrained to dismiss the said suit on 2-7-1999. The learned Counsel further submitted that the petitioner also did not take steps to serve respondent No.6 in spite of numerous opportunities given to him. The learned Counsel further submits that the petitioner is not entitled for discretionary reliefs from this Court.

9. I have given my anxious consideration to the rival submissions. In my view at the outset the application made by the petitioner would have to be held to be one under O.9 R.5 of C.P.C. and, therefore, the matter would have to be considered in that context. The dismissal of a suit operates very harshly against a plaintiff, who has come for a particular relief. Moreso, if the dismissal is not on merits but for technical reasons, in the instant case may be the Trial Court was justified in dismissing the said suit on 2-7-1999 for the reasons stated by it which was mainly that the petitioner had not remained present and had also not paid the costs. However, insofar as the rejection of CMA 139 of 1999 is concerned, in my view the explanation given by the petitioner that he and his advocate were labouring

under an impression that the matter was adjourned to 22-11-2005 and therefore had not appeared on 11.11.2005, appears to be plausible. Insofar as the service of summons on respondent No.6 is concerned, it is significant to note that the respondent NO.6 himself in the said suit had filed pursis that he has been unnecessarily joined as a party respondent, therefore, in my view though the petitioner had to comply with the legal requirement of effecting service on respondent No.6, dismissal of the suit on account of steps not having been taken to serve respondent No.6, operates harshly against the Petitioner, as no relief has been claimed against the said respondent No.6 it is significant to note that the petitioner has also moved the application for restoration immediately. In my view, a party should not be non suited on technical grounds but should be given an opportunity for prosecuting his remedy on merits. In that view of the matter, the impugned orders would have to be set aside and the matter would have to be relegated back to the learned Civil Judge, Junior Division, Nashik for hearing the said MCA 139 of 1999 for restoration of the said suit. Resultantly, the following directions would have to be issued :

(i) The impugned order dated

23-12-2005 and order dated 11-11-2005 are set aside. CMA No.139 of 1999 is restored to file.

(ii) The petitioner to take steps to serve respondent No.6 within three weeks from date.

(iii) The learned Civil Judge, Junior Division, Nashik is directed to try the said CMA No.139 of 1999 expeditiously and dispose of the same within three months from date.

(iv) The interest of justice would also be served if the petitioner is directed to pay the costs of Rs.5,000/- to the contesting respondent Nos.1 and 2 within four weeks from date.

(v) Rule is accordingly made absolute in the aforesaid terms.

. Parties to act on ordinary copy of this order duly authenticated by the Sheristedar of this Court.

(R.M. SAVANT, J)